United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1404

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

MARI-ANN DANISE,
HARRY LEVINE BENSON, and
HERBERT KAMINSKY,

Defendants-Appellants.

Docket No. 76-1404

REPLY BRIEF FOR APPELLANT MARI-ANN DANISE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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I

In its responsive brief, the Government seeks to dissociate itself from the theory of the case it strenuously propounded at trial, which was that Buhler was the legitimate owner of the diamond that became the subject of this case. Rather than adhere to its original position, the Government argues alternatively that the question of the ownership of

the diamond by Buhler was raised by the defense (see page 11, where the Government states that Buhler testified on cross-examination that he purchased a diamond, implying that this is where the testimony was first elicited); second, that the theory was presented by the Government only to meet an anticipated defense strategy of painting Buhler a rogue, thief, and smuggler (see Government brief at 27); and, third, that the Government did not rely on the claim of ownership "too heavily" (Government brief at 37).

However, if any one thing is clear from this record, it is that the Government made an affirmative part of its case the contention that Buhler owned the diamond and that the plan to establish that fact became part of the Government's strategy before there was any indication by the defense that there would be an attack on that claim.

In its brief, the Government concedes that prior to the trial, which began on May 24, 1976, the defense sought information about Buhler's criminal record, for the obvious purpose of impeaching him (see Government brief at 17-18).* No attempt was made to seek any specific information on the ownership of the gem and, indeed, the thrust of the colloquy that took place immediately prior to trial was that defense counsel needed the Swiss police records relating to Buhler's criminal record. No challenge was anticipated on the issue of ownership.

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*On May 18, 1976, counsel learned that Buhler would be a witness (Government brief at 17).

In contrast to this position of the defense attorneys was the preparation of the Government's case from its inception in January 1975 when Buhler went to the agents. The agents' reports on the case, later given to the defense as 3500 material, showed that from the moment of Buhler's initial contacts with the FBI he claimed ownership of the gems (GX 3504, dated 1/8/75; GX 3507, dated 3/26/75, at A.134; GX 3511, undated, at A.63).

In accordance with its line of pretrial preparation, the prosecutor opened his case with the unequivocal statement to the jury:

> You will hear that Mr. Buhler doesn't have an unblemished record himself. There are dishonest things that he has done. But, ladies and gentlemen, those were Mr. Buhler's stones, and he was there. And, the government will prove beyond any question that he was the legitimate owner of those two very valuable jewels and that these three defendants on trial here before you obtained those two gems from him without any intention of paying for them. That is, obtained them from him by fraud.
>
> (90).

Also in his opening statement, the prosecutor said:

> ... [Y]ou will hear from the Swiss jeweler, Hans Buhler, who owned the two gems. Hans Buhler will tell you how he went up to the place of business of the defendant Mari-Ann Danise on 39th Street, expecting to show his stones to legitimate business people.
>
> (88).

Questions 13 through 16 of direct examination went to establishing that Buhler bought the gems:

Q Directing your attention to June of 1974, did you purchase a large diamond?

A [by Buhler] Yes.

Q What was the size of the diamond when you purchased it?

A 9 karat 90.

Q Showing you what has been marked Government's Exhibit 4, can you identify it?

A That is the Bank at Weiss, which I bought a cashier's check.

Q Is that used to pay for the purchase of the diamond?

A Yes.

(119).

And then the prosecutor asked about the cost of the stone (121) and the joint purchaser (121).

The prosecutor continued to pursue the matter in his closing remarks to the jury, stating:

> ... But, ladies and gentlemen, the government submits that the documents support Buhler each step of the way and that this case is about the emerald and the diamond, and that's what you have to concentrate on.
>
> The government submits that all you have to find about Mr. Buhler is two things:
>
> One, that he owned those stones and; two, that these defendants took them away.
>
> Now, a lot of conversation was made in cross examination about who owned those stones, ladies and gentlemen, and the government wants to hit that straight on. Let's talk about who owned those stones.
>
> Ladies and gentlemen, the government submits that no fewer than six documents

established the witness Hans Buhler's ownership of those stones. Government's Exhibit 4 in evidence, the bank draft for 510 Swiss francs, and on cross examination you heard Buhler identify the penciled writing on that document as his own, and tell defense counsel that "D.I." stood for diamond and 9.90 was the karat and the 510 francs was what was spent for that diamond.

Then you saw later on the bank records put into evidence, ladies and gentlemen, which showed that on the 22nd of June 510 francs came out of the witness Buhler's account which represented this bank draft, ladies and gentlemen, and that the day before 260,000 francs had gone in which was his partner's share for the two stones. So that is the purchase of the diamond, ladies and gentlemen.

(689-690).

The Government's deliberate choice to prosecute this case on the theory of Buhler's ownership set the context of the case and gave rise to several of the legal issues presented by appellants. The Government cannot now cause those issues to vanish by minimizing the importance of its choice of theory upon which to prosecute or by attempting, with benefit of hindsight, to blame an erroneous strategic decision on the defendants. See United States v. Delia Aguilar San Juan, Doc. No. 76-1300, slip op. 471 (2d Cir., November 10, 1976).

Based on its attempt to minimize the testimony of Buhler's ownership, the Government argues that any testimony that Barth might have been able to provide about the purchase of the gem was inadmissible because it was only collaterally impeaching. However, since the legitimate possession of the victim is required for violation of 18 U.S.C. §2314 (see Point I-A of the

brief for appellant Kaminsky), the issue is not collateral. Legitimate possession is an element of the crime, and the Government deliberately chose to prove such possession by establishing ownership. Whether the Government would have had to prove ownership in some other case is not relevant: in this case, the Government elected to proceed on that theory.

Further, whether or not the legitimate possession of the complainant is necessary to establish a violation of the statute, the Government created an issue as to ownership by affirmatively interjecting it into the case through Buhler's testimony. Since Buhler's credibility was a key issue, like any other witness, he could be impeached on the question of ownership by extrinsic evidence showing he was lying. See Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954); United States v. Warren, 453 F.2d 738, 742 (2d Cir. 1972); United States v. Cuadrado, 413 F.2d 633, 635 (2d Cir. 1969), cert. denied, 397 U.S. 980; United States v. Beno, 324 F.2d 582, 588 (2d Cir. 1963); In Cuadrado, this Court made clear that

> [w]here a defendant in his direct testimony falsely states a specific fact the prosecution will not be prevented from proving ei either through cross-examination or by calling its own witnesses that he lied as to that fact.... The ratic ale behind this rule is not difficult to perceive, for even if the issue is irrelevant and collateral, a defendant should not be allowed to profit by a gratuitously offered misstatement.
>
> Id., 413 F.2d at 635.

While Cuadrado related to the defendant as a witness, since it is now unchallenged that a defendant who chooses to testify is treated like any other witness, it follows a fortiori that the Cuardado principle is one of general applicability. Cf. United States v. Torres, 503 F.2d 1120, 1126-1127 (2d Cir. 1975); United States v. Robinson, Doc. No. 76-1177, slip op. 333, 338 (2d Cir., October 29, 1976).*

The Government's reliance on Rule 608(b) does not help its position. The cases cited above specifically hold that a party cannot take advantage of a lie it places before the jury by insulating it from proof to the contrary. Rule 102 necessitates continuing adherence to that principle by requiring construction of the Rules of Evidence so as to ascertain truth and to determine the proceedings justly.

II

Without disputing that the handwritten notes on the bank draft were not business records, the Government argues that they were not hearsay because Buhler, the writer of the notes, was present to be cross-examined. However, Rule 801(c) of the Rules of Evidence specifically rejects that definition:

> Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted.

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*The Government attempts to distinguish Robinson, but does so only on another part of the Court's decision.

The Government nonetheless argues that Rule 801(d)(1)(B) applies to make the statement admissible as a prior consistent statement -- a claim not made at trial. At the time the document was introduced, there was no express or implied charge against Buhler of recent fabrication or improper motive or influence. Moreover, the document does not reflect when the handwritten notes were made or whether they were made for the purpose of supporting Buhler's claim that he owned the diamond. Thus, there is no indication that the notes were made prior to the formation of Buhler's story that he purchased and owned the diamond. Indeed, even as late as May 5, 1975, Buhler's story as to his ownership of the gem was in flux, for he claimed that he paid for it in cash, rather than by check (236) as he did later at the trial. Thus, the statement does not qualify as a prior consistent statement. United States v. Rodriguez, 452 F.2d 1146, 1148 (9th Cir. 1972); United States v. De La Motte, 434 F.2d 289, 293 (2d Cir. 1970); Felice v. L.I.R.R.Co., 426 F.2d 192, 198 (2d Cir.), cert. denied, 400 U.S. 820 (1970).

III

The Government argues that although Benson objected to the admission of the handwritten note on the bank draft and requested permission to depose Barth, appellant Danise did not make known her own objection or request, and is therefore precluded from making challenges on appeal. The Government

relies on United States v. Indiviglio, 352 F.2d 276, 279-280 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966). However, Indiviglio makes clear that the purpose of an objection is to put the district judge on notice that the defense has a complaint about an event at trial or the judge's ruling. This gives the judge an opportunity to make any necessary changes or to take corrective steps, thereby avoiding trial error. Here, of course, the judge was given that opportunity when Benson's attorney interposed an objection to the admission of the notes, and, as the Government's brief itself demonstrates (see n. at 36), the judge summarily overruled any objection.

Moreover, this Court has held that no objection need be tendered by the defense where the trial court has only moments before denied an identical request made by another person (United States v. Mauro, Doc. No. 76-1251, slip op. 265, 270 n.3 (2d Cir., October 26, 1976)) or where the judge has summarily disposed of an objection (see United States v. Ong, Doc. No. 76-1087, slip op. 5517, 5538 (2d Cir., September 14, 1976)).

As to the motion for a continuance to take Barth's testimony, after counsel for Benson spoke, other counsel attempted to join in the motion, and the judge refused to permit such conduct or even to listen to counsel's explanation (491). The court's primary concern was the rejection of any implication that the Assistant U.S. Attorney had known about and suppressed Barth's information. The court failed to recognize, as counsel

may have been trying to point out, that the Government had not made any attempt to corroborate the story of Buhler, its key witness, and that the Government's failure to prepa e its case properly led to the representations to the defense that Buhler owned the gems. When, after the trial began, it became apparent to the defense as well as the prosecution that Barth had significant information, defense counsel attempte' to make a timely request for a continuance, and the judge's refusal to grant a continuance was error.

CONCLUSION

For the foregoing reasons and the reasons argued in the main brief for appellant Danise, the judgment of the District Court must be reversed and the case remanded for a new trial.

Respectfully submitted,

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